

When can the burden of proof in a liquidation situation be reversed?

Managing directors play a vital role in the operational and financial management of a company. However, in certain situations, their actions or inactions can lead to disputes over their liability.

In this article, we examine a recent court case concerning the liability of a managing director under bankruptcy law, highlighting the importance of compliance, the burden of proof and the application of the relevant legal provisions.

In the present case, the Court of First Instance ordered the defendant (the former managing director of the company) to pay a security into the escrow account of the Tribunal, finding that the defendant had failed to fulfil its obligations under the Bankruptcy Act to submit the company's financial report. Therefore, the court applied the provision of the bankruptcy law according to which the burden of proof was reversed and it was up to the managing director to prove that he had fulfilled his obligation to submit and publish the annual financial report, that the company was not threatened with insolvency in the course of his management duties and that he had taken into account the interests of creditors.

In its appeal, the defendant sought to prove by documentary evidence that it had fulfilled its obligation to deposit the accounts, albeit with some delay, and stressed that the mere delay in fulfilling the obligation did not automatically justify the application of the provision on the reversal of the burden of proof. The Court of Appeal examined the case and acknowledged that the reversal of the burden of proof effect of the Bankruptcy Act applies only to certain elements of the statutory facts. While it was established that the company was in a situation of imminent insolvency and that the director was not acting in the best interests of the creditors, other elements remained unproven. These included the failure to satisfy creditors' claims and the possibility of a causal link between such failure and the conduct of the managing director.

The court found that the defendant had fulfilled its obligations, including depositing and submitting the necessary reports and documents. The purpose of the reversal of the burden of proof provision in the bankruptcy law was to facilitate proceedings when balance sheets and documents were not available, but this was not the case here. The court concluded that, in the absence of the defendant's failure to act, the provision on reversal of the burden of proof did not apply.

The court stressed that the plaintiff should have established the statutory elements of probable cause at the time of the insolvency and a causal link between the conduct of the manager and the possible failure of the creditors' claims. However, this did not happen, so the defendant could not be ordered to provide security in the absence of evidence.

The decision highlights the importance of the managing director's fulfilment of his/her obligations and the limitations of the provisions on the reversal of the burden of proof, but also states that the late fulfilment of an obligation is not in itself sufficient to establish management liability.